IN THE

Supreme Court of the United States

October Term, 1964.

No. 292.

THE ATLANTIC REFINING COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF OF PETITIONER THE ATLANTIC REFINING COMPANY.

Frederic L. Ballard, Jr.,
Charles I. Thompson, Jr.,
Tyson W. Coughlin,
Land Title Building,
Philadelphia, Pa. 19110

Roy W. Johns,
Joel L. Carr,
Harry W. Gill, Jr.,
260 South Broad Street,
Philadelphia, Pa. 19101
Attorneys for Petitioner, The Atlantic Refining Company.

Ballard, Spahr, Andrews & Ingersoll,
Land Title Building,
Philadelphia, Pa. 19110
Of Counsel.

February 5, 1965

International, 711 So. 50th St., Phila., Pa. 19143

INDEX

INDEX (Continued).

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

STATUTES.

OTHER AUTHORITIES.

IN THE

Supreme Court of the United States.

October Term, 1964.

No. 292.

THE ATLANTIC REFINING COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF OF PETITIONER
THE ATLANTIC REFINING COMPANY.

This case is before the Court on certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit affirming and enforcing an order of the Federal Trade Commission.

The Petition for Writ of Certiorari was filed on July 17, 1964. Thereafter, the Solicitor General filed a Memorandum for the Federal Trade Commission joining with the Petitioner in urging this Court to review the judgment in question. Certiorari was granted on December 14, 1964.

OPINIONS BELOW.

There are three opinions below: the initial decision of the Hearing Examiner of the Federal Trade Commission, filed on October 23, 1959; the opinion of the Commission on appeal from the Hearing Examiner, filed on March 9, 1961; and the opinion of the Court of Appeals on petition for review of the Commission's order, filed on April 24, 1964.

The initial decision of the Examiner (R. 41) and the opinion of the Commission (R. 61) are reported at 58 F. T. C. 309 (1961). The opinion of the Court of Appeals (R. 3282) is reported at 331 F. 2d 394.

JURISDICTION.

The order of the Court of Appeals was entered on April 24, 1964 (R. 3299). The final decree of the Court of Appeals was entered on May 20, 1964 (R. 3300-1). Petitioner filed its petition on July 17, 1964 invoking the jurisdiction of this Court under Section 1254(1) of the Judicial Code, 28 U. S. C. § 1254(1).

STATUTE INVOLVED.

The statute involved is Section 5(a)(1) of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1), which reads in full as follows:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

QUESTIONS PRESENTED FOR REVIEW.

The broad question presented for review is whether it is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for an oil company and a tire company to enter into an agreement under which the oil company, in return for a commission, sponsors the sale of the tire company's products to the oil company's retail dealers. Within this broad question lie a number of more specific questions, which are set forth below.

The terms and circumstances of the case—in which these specific questions are presented—are as follows:

The Atlantic Refining Company ("Atlantic") is one of the smallest integrated oil companies. It markets gasoline, lubricating oils and greases in a seventeen-state region along the eastern seaboard.

Atlantic does not sell directly to the motoring public. It sells to service station operators known as "dealers," who resell to consumers.

The goods involved in this proceeding are tires, batteries and automotive accessories—fan belts, radiator hose, seat covers, waxes, polishes, chains, antifreeze, etc.—known in the industry as "TBA."

Since the nineteen-twenties, Atlantic has been selling TBA to its dealers along with Atlantic petroleum products. All other oil companies likewise sell or sponsor the sale of TBA to their service station operators, and the TBA sold or endorsed by an oil company is known as "sponsored" TBA.

Before 1951, Atlantic-sponsored TBA was purchased by Atlantic from various manufacturers and distributed to the Atlantic dealers through warehouses owned by Atlantic. In some areas the warehouses were supplemented by Atlantic dealers who acted as sub-distributors to other dealers, such sub-distributors being known in the industry as

"supply points." This arrangement, in which the oil company purchases the sponsored TBA and resells and distributes it to the dealers, is known in the industry as "purchase-resale."

Purchase-resale proved inefficient for Atlantic dealers because of the physical limitations of Atlantic warehouses and the difficulty of building a network of supply points. Consequently, in March 1951, Atlantic changed to the other TBA arrangement used in the oil industry—the sales commission plan.

Under the sales commission plan, the tire company—rather than the oil company—performs the distribution function. The sponsored TBA is manufactured or purchased by the tire company and is distributed through warehouses owned by the tire company. Also, the tire company uses as supply points a large number of its own outlets (both company-owned and independent) as well as some oil company supplying dealers, who are franchised by the tire company for this purpose. This network of warehouses and supply points provided better deliveries to Atlantic dealers than had been provided by purchase-resale.

Under both purchase-resale and the sales commission plan, Atlantic is primarily responsible for selling the TBA to the Atlantic dealers and assisting them in selling it to their motorist customers. The tire company salesman occasionally accompanies the Atlantic salesman to explain new TBA products, but the day-to-day promoting and selling are done by the Atlantic salesman.

Under purchase-resale, Atlantic attempted to recoup its cost of sales and distribution out of the margin between its buying price and its selling price, but found that it was suffering substantial losses. Under the sales commission plan, the tire company bears the cost of distribution and pays Atlantic a commission to compensate Atlantic for its selling expenses. In practice, these commissions have approximately equalled Atlantic's selling costs.

Atlantic has two sales commission contracts, one with The Goodyear Tire & Rubber Company ("Goodyear") for a portion of Atlantic's marketing territory, the other with The Firestone Tire & Rubber Company ("Firestone") for the remainder of the territory.

The Federal Trade Commission challenged the sales commission contract between Atlantic and Goodyear as an unfair method of competition under Section 5 of the Federal Trade Commission Act.[1]

The Hearing Examiner upheld the legality of the sales commission plan. The Federal Trade Commission reversed the Examiner and entered an order which prohibits Atlantic from using the sales commission plan with Goodyear or Firestone. Furthermore, the order prohibits Atlantic from using the plan with any other tire company, and also prohibits Goodyear from using the plan with any other oil company. The order, however, would permit Atlantic to resume purchase-resale of Goodyear TBA or any other TBA.

Similar orders were entered in two companion cases (discussed below).

The result is to outlaw the sales commission method of distribution for all oil companies dealing with any of the tire company respondents in the three cases. This includes a very large proportion of the smaller regional and local companies in the oil industry.

The basis for the Commission's order in each case is the supposed anticompetitive effects of the sales commission contract. The Commission said that abolition of the sales commission plan would (a) terminate the supposed competitive advantage enjoyed by Goodyear supply points, and (b) supposedly enable small tire manufacturers to compete for Atlantic's sponsorship.

On appeal in this case, the Court of Appeals affirmed the Commission and held the TBA sales commission con-

---

1. Firestone was not made a party to the proceedings, but the legality of Atlantic's sales commission contract with Firestone was challenged by the complaint.

tract to be, in effect, an illegal tying agreement. The Court —mistakenly, in Atlantic's view—said that the Commission had followed this same tying rationale.

The specific questions presented are:

(a) Is there any substantial competitive effect of the sales commission arrangement—which the Commission forbade—that differentiates the sales commission plan from purchase-resale—which the Commission permitted? Specifically, would abolition of the sales commission plan accomplish the purposes claimed by the Commission? If not, does the Commission have a rational basis for its order as required by the decisions of this Court? (Discussed in Part I of the Argument at page 42 of this brief.)

(b) Where a time-honored business arrangement (the sales commission plan) is defended on the grounds of superior efficiency and practical necessity, may the Commission forbid it *per se* without consideration of this defense? (Discussed in Part II of the Argument at page 46 of this brief.)

(c) May the Commission, in challenging a contract under Section 5 of the Federal Trade Commission Act on the basis of competitive effects, ignore the standards of competitive effect and market significance which would be applicable in analogous cases under the antitrust laws? (Discussed in Part III of the Argument at page 49 of this brief.)

(d) Did the Court of Appeals err in attributing a tying rationale to the Commission? If not, has the Court (and the Commission) disclosed adequate grounds for characterizing the sales commission plan as a tying arrangement? (Discussed in Part IV of the Argument at page 56 of this brief.)

STATEMENT OF THE CASE.

I. THE ISSUES.

The sole issue in the case at this stage of the proceedings is, to use the words of the Commission, "the legality of respondents' use of a *particular method* of distributing TBA products" (R. 124, italics are the Commission's). The method to which the Commission refers is the sales commission plan.

Atlantic's fundamental position is that the Commission's order outlawing the sales commission plan does not make sense. The Commission's opinion does not disclose any substantial reason for denying Atlantic the use of the sales commission arrangement it has found more efficient for its dealers and thus forcing it to use the purchase-resale arrangement it has found less efficient and more costly.

Atlantic also contends that the Commission erred in not considering the business justification for the sales commission plan and in not measuring the supposed anticompetitive effects of the plan in any market.

A. Issues Eliminated From The Case.

The legality of the sales commission method of distribution was not always the single issue in the case. At earlier stages two other issues were presented:

First, the legality of TBA selling by Atlantic. Counsel supporting the complaint sought an order which would have outlawed purchase-resale as well as the sales commission plan. The practical effect would have been to prevent Atlantic from selling TBA to its dealers under any arrangement. The Staff's request for such an order was refused by the Examiner and the Commission.

Second, the issue of coercion. The Examiner ruled that the record contained instances of pressure on Atlantic dealers which would support an order prohibiting coercion. This was upheld by the Commission and affirmed by the Court of Appeals. The Commission's order prohibits Atlantic from "intimidating or coercing or attempting to intimidate or coerce any wholesaler or retailer of Atlantic petroleum products to purchase any brand or brands of TBA products." It further prohibits Atlantic from "preventing or attempting to prevent any wholesaler or retailer of Atlantic petroleum products from purchasing and reselling, merchandising or displaying TBA products of his own independent choice" (R. 133).

Atlantic has not sought review of the coercion paragraphs of the Commission's order. Its policy has always been that its dealers are free to buy the TBA of their choice.[2] By reason of this policy and the paragraphs of the Commission's order not under review, this Court may assume that no Atlantic dealer will be forced to handle TBA he does not want or prevented from handling the TBA he prefers.

II. THE FACTS.

A. Atlantic's Relationship With Its Dealers.

Atlantic markets its petroleum products under the "Atlantic" brand. The service stations of the Atlantic dealers are marked with distinctive "Atlantic" signs, and their gasoline is sold through distinctive "Atlantic" pumps, so that their service stations are recognizable by the motoring public as "Atlantic" stations.

The sale of Atlantic gasoline to motorists is the principal business of Atlantic dealers, and the bulk of Atlantic's

2. The handful of coercive incidents described by the Examiner—insofar as they represented pressure by the Atlantic salesmen rather than a clash of personalities—were unauthorized.

gasoline sales is through these dealers. Thus, the dealers and Atlantic are mutually dependent on one another for important segments of their businesses. Business is attracted and retained, not only by the goodwill associated with the "Atlantic" brand, but also by the confidence which motorists derive from favorable experience at Atlantic stations (R. 273, 1774, 2287-8).

There are two kinds of arrangement between Atlantic and its dealers. In the first, Atlantic provides the station and basic equipment and leases it to the dealer. After a trial period of two one-year leases, successful lessee dealers operate under successive three-year leases.[3] The lease requires the dealer to operate a first-class service station, including the handling of TBA normally handled at competitive service station outlets. It does not specify any particular brand or brands of TBA. A supplementary letter advises the dealer of the standards (such as sanitary conditions, hours of operation and display of merchandise) which Atlantic believes are essential to successful operation (R. 274, 280; CX 88B, N. T. 284,[4] R. 2466-74).

In the second kind of arrangement, the dealer provides his own station and obtains his Atlantic sign and pumps and his petroleum products under a supply contract, which runs for a specified term or until a specified gallonage has been purchased (R. 274; CX 90A-B, 90C-D, N. T. 35 and 285, R. 2486-95).

Qualified dealers are scarce and always have been. One of the primary tasks of the Atlantic marketing organization is to recruit and hold able dealers. As a matter of competitive necessity, Atlantic must and does offer an

3. When the hearings were held in this case, Atlantic's three-year lease program was just beginning and only a few dealers had three-year leases (R. 46-7, 276; RXA 31A-F, R. 2209, 3274-81). Unquestionably, the proportion is much higher today.

4. The printed record does not contain the portions of the notes of testimony at which certain exhibits were offered in evidence. In such cases, reference is made to the original notes of testimony, designated "N. T."

All the oil companies offer TBA. Without TBA programs, they could not attract dealers (R. 2239, 2029-30).

The national oil companies such as Esso, Gulf and Mobil sell TBA under their own names or private brands in competition with the national tire companies.[16] Because they operate nationally, these oil companies can provide the national warranty on tires and major accessories which modern motorists demand.

By contrast, regional oil companies like Atlantic cannot successfully sell TBA under their own names. They cannot use national advertising or provide a national warranty (CX 136A-E, N. T. 63, R. 2710). Few motorists would buy an "Atlantic" tire in preference to Goodyear, Firestone, Sears or Atlas. There is no one to fulfill the warranty on an "Atlantic" tire outside Atlantic's marketing area. Because of the difficulty of selling local brands of tires, most regional oil companies sponsor national brands.

In theory, regional oil companies could supply national brand TBA to their dealers by either purchase-resale or the sales commission plan. In practice, most of them operate on sales commission. The distribution of TBA, which is complex, changeable, seasonal, and subject to the consumer's taste, is very different from the distribution of petroleum products (R. 2292-4). Apparently, national oil companies can master both the petroleum business and the TBA business.[17] Regional oil companies stick to the oil business. They leave the problems of TBA distribution to

---

16. Gulf and Mobil use their own names. Esso and the other Standard companies sell the Atlas brand.

17. The Commission did not put into the record which oil companies were using sales commission and which were using purchase-resale. The brief filed by Goodyear in No. 296 lists twenty-one oil companies currently using the sales commission plan with Goodyear and says that 14 of them are not deemed to be "major" companies (pp. 47-48). Statistics received in evidence in *Goodrich-Texaco* list 18 oil companies selling private brand tires under purchase-resale. The list is primarily made up of companies which would be deemed to be "majors". See page R. 222 of the printed record filed in No. 635.

the tire companies, who have the specialized facilities and trained personnel to handle it.

Atlantic's sales commission arrangements with Goodyear and Firestone enable Atlantic to hold its own against national oil companies five times it size in the competition for dealers and, through them, in the competition for the motorists' business.

Conversely, the effect of the Commission's order outlawing the sales commission plan will be to handicap Atlantic and other regional oil companies, to deprive their dealers of the most efficient and economical TBA distribution, and to enhance the competitive advantages of the national companies and their dealers.

H. Effects On Competition—The TBA Industry.

The Commission and the Court of Appeals ignored the beneficial effects—indeed the necessity—of the sales commission plan in the oil industry. They considered only the tire, battery and accessory industries and, moreover, only that small portion of the tire, battery and accessory industries which consists of selling TBA to service stations. Even there, they paid no attention to the competition which the service station operators encounter from tire stores, automotive stores, chain stores, mail order houses,[18] garages, car dealers, discount marts and department stores.

In its consideration of the tire, battery and accessory industries, the Commission did not identify any relevant market. The Court of Appeals fixed upon "Atlantic's seventeen-state service station TBA market" (R. 3297). Within this market, the record proves nothing as to competitive effects. There is no evidence as to:

18. Statistics received in evidence in *Goodrich-Texaco* (but explicitly disregarded by the Commission) show that in replacement tire sales Sears' share of the market increased from 5.8% to 12.1% in the period 1946-55, and that in the latter year the Sears brand was the third largest in this market—larger than all oil company brands and larger than all but two rubber company brands. The Riverside brand marketed by Montgomery Ward also increased its share of the market by more than one-third during the period. See page R. 224 of the printed record filed in No. 635.

attractive dealer program, including training, financing, business coaching, advertising, sales promotion assistance, and the aid of Atlantic credit cards. Other oil companies offer competitive programs (R. 1430-1, 1918-9, 2040, 2189-90, 2287).

B. Reasons For Atlantic's TBA Program.

With the evolution from the "filling station" selling only petroleum products to the "service station" offering all goods and services needed by the motorist, the public has come to expect oil company dealers to sell, install and service TBA. The Hearing Examiner found that the handling of TBA is a necessary part of the dealers' operations. He further found that Atlantic has a legitimate interest in having its dealers engage in the sale of TBA, as this builds a stronger dealer organization and increases the sale of gasoline, and that TBA is essential to the dealers' profitable operation (R. 47). For many dealers, TBA profits are the difference between success and failure (R. 1441; RXA 20, R. 2038, 3257-9; CX 247B, N, T. 314, R. 2935, et seq.).

It is not easy for dealers to market TBA. TBA is complex and ever-changing. A full assortment of tires would number in the hundreds, yet a dealer with a small station may have to choose the 25 most saleable for his limited inventory. He needs quick delivery when a motorist asks for a size he does not stock. Characteristics of tires and batteries change from year to year. New accessories are constantly being developed. Inexperienced dealers need training and help in getting started. All dealers, regardless of experience, need sales promotion assistance. Training, sales promotion, and ready availability of all items are the fundamentals of Atlantic's program (R. 1442-3, 1609, 1677, 1921-2, 2030, 2201-2).

Because oil company dealers maintain small inventories, buy in small quantities, and frequently demand emergency deliveries, they are not particularly attractive

customers for most TBA distributors. No one but the oil companies offers a TBA program tailored to the service station operator's needs. None of the competitive distributors of TBA who testified in this proceeding offered training. None offered more than rudimentary sales promotion. None offered a full and balanced TBA line. None made it a point to provide speedy deliveries to small, isolated dealers as well as to large ones.

C. Development Of Atlantic's TBA Program.

Atlantic's TBA program began in the nineteen twenties, when the company was still operating its own service stations. Even in those early days, Atlantic found that the motorist needed not only gasoline, but also tires, batteries, goggles, dusters and other items which would be classified as TBA today. So Atlantic began to stock these items in its stations (R. 2290).

Later, when Atlantic moved away from company operation of its service stations, the independent dealers who took over the stations continued to look to Atlantic for TBA as well as petroleum products. No one else was offering them TBA. Tire companies were more interested in selling to garages and tire stores than in selling to service stations. The automotive parts suppliers who were calling on service stations with other merchandise did not carry TBA (R. 2290-1).

Thus, Atlantic developed its purchase-resale TBA program to fill an unmet need. There was no question of diverting established trade or lessening established competition. The emerging market represented by the motorists calling at Atlantic service stations was not being adequately served by anyone. Atlantic stepped forward to help the dealers serve it (R. 2289-90).

TBA was, and is, a service which Atlantic has found necessary for successful station operation. Atlantic's TBA commissions are less than ¼ of 1% of its revenues from

petroleum products (R. 146-7, 50). Atlantic's object is to sell petroleum products and strengthen its dealers (R. 1443, 2201-2).

D. The Change To The Sales Commission Plan.

As automobile travel increased and the problems of supplying the motoring public's needs became more complex, Atlantic's purchase-resale program was no longer satisfactory. One reason for this was the limited public acceptance of the "Lee" brand tires then handled by Atlantic. But the principal reason was that Atlantic's distribution system, organized to deliver petroleum products on a regular schedule, was completely unsuited to the unpredictable demand for TBA, particularly batteries and accessories.[5] Atlantic was losing money at the rate of $400,000 a year in its efforts to meet its dealers' needs (CX 136A-E, N. T. 63, R. 2714). But more important, it was not succeeding in these efforts. The dealers' needs were not being met (R. 2290-4).

Faced with monetary losses and an inefficient TBA distribution system, Atlantic began to shop around for a better program. Its original inquiries, sent out in 1948, contemplated a change of suppliers under purchase-resale. However, Goodyear and Firestone, instead of quoting on a purchase-resale contract, offered sales commission plans which would solve both of Atlantic's major problems—distribution and consumer acceptance. Under these plans, Goodyear and Firestone, through their established distribution systems, would fill the crying need of Atlantic dealers for a ready source of supply. Furthermore, they both had

5. A contemporaneous Atlantic document explaining the reasons for the change to the sales commission plan calls attention to "the physical limitation of our warehouses and delivery system." It notes that, "if space for TBA is also to be considered, the capital investment will be greater" and "A greater investment in drays [sic] for delivery service is also required if we are to give good competitive service to our dealers. This, again, requires capital investment strictly for the TBA program." (CX 108A-J, N. T. 66, R. 2624-5)

brand names with a wide public acceptance throughout Atlantic's marketing territory (R. 2300).[6]

After an investigation lasting more than two years, Atlantic elected to take on the Goodyear and Firestone lines [7] and turn over the distribution function to the two tire companies, believing that the change was best for Atlantic and best for its dealers.

The effect of this change in distribution function can be seen in the following table based upon a contemporaneous Atlantic document (CX 136A-E, N. T. 63, R. 2714). The figures were compiled in March 1951 and were based on the best obtainable information as to the actual results of operating Atlantic's purchase-resale program in 1950.

Deficit under Purchase-Resale

Total 1950 TBA sales by Atlantic to Atlantic dealers under purchase-resale	$7,489,329
Estimated gross profit on these sales (i.e., margin between Atlantic's buying price and selling price)	$1,663,880
Total expense of operating purchase-resale program	$2,071,421
Deficit under purchase-resale	$ (407,541)

6. Neither Goodyear nor Firestone manufactures a full line of TBA. Both of them purchase batteries and most accessories from others. In some cases, such as duPont chemicals, the accessories handled by Goodyear are the same as those previously handled by Atlantic under purchase-resale. (R. 67, 81)

7. Atlantic took on the Goodyear line for a portion of its marketing area and Firestone for the balance. Atlantic believed that both would do a better job if they were competing for its representation in the entire territory (R. 2296). The split was a matter of selection by Atlantic regional personnel "decided upon by local advantages enjoyed by the respective rubber companies . . ." (CX 136A-E, N. T. 63, R. 2709).

Savings under Sales Commission Plan

Expenses expected to be eliminated under the sales commission plan:

Delivery to Atlantic warehouses	$ 5,756
Delivery to Atlantic dealers	106,070
Warehousing	268,664
Accounting in Atlantic's sales districts	202,000
50% of direct expense	17,246
Regular accounting	354,000
Miscellaneous labor	28,211
Credit-collection	9,381
50% of selling expense	227,840
33⅓% of district administration	25,855
33⅓% of regular administration	43,896
50% of advertising	17,820
25% of direct headquarters expense	17,327
75% of indirect headquarters expense	81,625
Total savings	$1,405,691

The savings of $1,405,691 listed above would have reduced Atlantic's TBA expenses from $2,071,421 to $665,000. Atlantic estimated that its TBA commissions would have been $675,000. Thus, the $407,000 loss under purchase-resale would have been converted into a $10,000 gain under the sales commission plan.

The memorandum accompanying the calculation points out (R. 2713-4):

> "In addition to this favorable comparison, we [Atlantic] would have secured much needed warehouse space and delivery facilities that could be used to advantage for our petroleum products. Some of our personnel could have been eliminated but much of it could have been assigned to other jobs where help is urgently needed. Our operational people would have been free to effect greater improvements and efficien-

cies in the handling of petroleum products where worthwhile savings can still be effected.

"It is expected, however, that the greater benefits from the new TBA program will come about through improved services and supply to our dealers; and as a result of their increased sales and profits we will enjoy direct benefits from increased commissions and indirect benefits in better dealer stability."

E. Operation Of The Sales Commission Plan.

Under the sales commission plans, a number of outlets in the Goodyear and Firestone distribution systems, in addition to warehouses, serve as supply points for Atlantic dealers (R. 78-9, 100). These supply points include company stores owned by Goodyear and Firestone, independent distributors or dealers franchised by Goodyear and Firestone, and also Atlantic distributors and dealers franchised for this purpose by Goodyear or Firestone. Whatever their status, the supply points assume responsibility for carrying adequate inventories, making deliveries to Atlantic dealers, and maintaining records. Franchised supply points buy from Goodyear or Firestone, as the case may be, and sell to Atlantic dealers. They buy on the same terms as other Goodyear and Firestone outlets, and receive no extra discount or payment for servicing Atlantic accounts (R. 395, 403-5).

The change to Goodyear and Firestone was welcomed by Atlantic's dealers.[8] The same familiar Atlantic sales-

8. Dealer preference for the new brands was established in a preliminary test held in three of Atlantic's sales districts for six to nine months before the new brands were adopted on a company-wide basis. Reports from the test districts showed that purchases of Goodyear and Firestone under sales commission were substantially higher than purchases of Lee under purchase-resale (CX 198A-204B, N. T. 296-300, R. 2881-2901), and a poll of the dealers in these districts understandably showed an overall preference for the new arrangement (CX 134, N. T. 71, R. 2703). The contrary conclusions of the Commission and the Court of Appeals are based on a 1948 survey (CX 101A-Z20, R. 801, 2565-90) which was not directed at the questions at issue in this case. Significantly, the Hearing Examiner, after hearing a full description of this survey, ignored it.

man continued to call on them, just as he had under purchase-resale. But the line of tires he offered after the change (Goodyear or Firestone) was more complete and enjoyed better public acceptance than the Lee tires he had offered previously. Also, the Goodyear and Firestone lines included a better balanced assortment of accessories; the Goodyear and Firestone distribution systems included more efficient networks of supply points, and the Goodyear and Firestone programs provided more promotional assistance and the potential for increased profits (R. 2302-3, 2094-5, 1689-90).

Under the sales commission plans, as under purchase-resale, Atlantic's job is to persuade its dealers of the advantages of the Goodyear and Firestone lines. Since a dealer is a reseller, who buys only as much TBA as he can sell to his customers, Atlantic also helps him in promoting his sales to motorists. Atlantic's selling and promotion efforts include:

(a) product information as to the characteristics, sizes, advantages and disadvantages of the various grades and kinds of TBA, which Atlantic provides in its dealer training schools and follow-up clinics;

(b) technical training on installation and service, again provided by Atlantic in its schools and clinics;

(c) business advice, particularly with regard to inventory control, which is of crucial importance to dealers;

(d) sales promotion assistance, provided by Atlantic through display materials and arrangements for promotional "events" to attract the motorists' attention and to build the motorists' confidence that they will find the items they need at an Atlantic station; and

(e) efficient distribution, which Atlantic assures by helping Goodyear and its supply points improve

deliveries to Atlantic dealers (R. 277-9, 1532, 1927-8, 2036-7, 2249-53, 2260-4).

For performing these services, which the Hearing Examiner found to be "substantial" (R. 58), Goodyear and Firestone pay Atlantic commissions of 10% of sales of sponsored TBA to Atlantic dealers.[9]

On Atlantic's side, the program requires the full time of nine specialists and 10% to 20% of the time of all salesmen. Some 58 other officials, together with their executive, administrative, secretarial, accounting and sales supervisory personnel, are also concerned to a greater or lesser degree with TBA (R. 271-3). The cost of operating the TBA program on the sales commission basis approximately equals the commissions received (R. 2298).

Atlantic could make a profit on TBA if it confined its efforts to those dealers who sell large quantities and produce large commissions. But Atlantic does not do this. It extends its TBA efforts to every Atlantic dealer, regardless of whether his TBA potential is sufficient to justify the expense. This is the essence of Atlantic's TBA program—the belief that Atlantic dealers (and through them, Atlantic) can sell more gasoline if motorists are confident they will find a complete stock of reliable TBA at every Atlantic station (RXA 20, R. 2038, 3258-9).

F. Atlantic's Free Choice TBA Policy.

Atlantic's TBA programs, both purchase-resale and sales commission, have always been offered for the dealer's acceptance or rejection as a matter of the dealer's choice. There has never been any contractual or other obligation on the part of the dealer to buy sponsored TBA or refrain from buying non-sponsored items.[10] To the contrary—

9. Atlantic is paid a commission of 7½% on sales of sponsored TBA to its wholesale distributors for resale to their dealers.

10. The Hearing Examiner found that there are in fact no Atlantic dealers who handle Goodyear or Firestone TBA exclusively (R. 56).

Atlantic's letter confirming the Goodyear arrangement CX 16, N. T. 35, R. 2368-9) said:

> "Goodyear will begin supplying the various products and services outlined in the letter of June 1, 1950 to such of our retail outlets and distributors as desire to purchase them from Goodyear. At the same time Atlantic, through its field representatives, will begin assisting Goodyear in the extended territory in the sale of the products and services outlined in said letter *with the understanding that, as has been the practice in the test area, our resale outlets shall be free to choose whether, and to what extent, they shall avail themselves of the opportunity to purchase Goodyear products and services and that any resale outlet which chooses to carry products other than Goodyear shall not be prejudiced in any manner.* Of course, we both understand that our organization cannot and will not use any methods other than salesmanship to encourage our resale outlets to purchase your products and services." (Emphasis supplied)

The policy is clear: Atlantic dealers are to buy TBA of their choice from suppliers of their choice.

Atlantic's free choice policy is published in writing to all dealers and all sales personnel. There is no evidence that it was countermanded; there are no company records inconsistent with it; no official of the company is alleged ever to have instructed a salesman to disregard it.[11]

In March 1951, when Atlantic adopted the sales commission plan, it explained its decision in a letter sent to all dealers (CX 150, N. T. 35, R. 2742-3). The letter said:

> "Our sales organization has been instructed to explain and demonstrate to you the many advantages of

11. The suggestions of the Commission and the Court that the policy was ignored in practice are not cited to the record. The only testimony which Atlantic has been able to find which would tend to support these findings is a single equivocal statement attributed to a salesman by a hostile and vindictive ex-dealer (R. 826).

the new TBA plan. They will do so with enthusiasm and conviction because they are confident that it will be advantageous for you to accept it. However, your acceptance or rejection of the program is a matter of your own choice."

Concurrently, Atlantic gave written instructions to all sales personnel that sales were to be made on the merits and that "under no circumstances are our dealers to be made to feel that they must buy this new program just because they are Atlantic dealers" (CX 149, N. T. 35, R. 2741).

In 1955, Atlantic's regional managers wrote their dealers (CX 207, N. T. 35, R. 2905-6):

> "If any of our people at any time insist on your buying any certain products or merchandise against what you feel is to your best interest, I want you to call the matter directly to my attention."

This letter is contained in Atlantic's franchise manual, which is reviewed with all prospective dealers (R. 1438-40, 1508-9, 1774, 1828, 1920). A copy of the letter is given to all new dealers (R. 1780, 1921, 2025-6).

In addition, the free choice policy is part of the required text for Atlantic's dealer training course in service station management (RXA 20, R. 2038, 3255-73)—a course which is attended by most new Atlantic dealers and all new Atlantic sales personnel. In this course, dealers and salesmen hear the policy side by side. The dealer knows exactly what his salesman's instructions and authority are (R. 1488-9, 1508, 1779, 2033-5).[12]

---

12. A year after the adoption of the sales commission plan, Atlantic's principal TBA officials went to dealer meetings (attended *in toto* by more than 1400 dealers) to learn how the program was working in the field. Among other things, they inquired if the free choice policy was being observed. They found that it was (R. 2242-5).

Atlantic sales personnel testified that they know and endorse the policy. One district manager said: "It isn't good business to force a dealer to do anything. He is only going to leave you. And if a good dealer leaves you then we lose business." (R. 1444)

If Atlantic's free choice policy did not mean what it says, one would expect that fact to be reflected in such things as countermanding instructions from Atlantic management to its sales personnel, records in Atlantic's files showing which dealers were handling non-sponsored TBA and how much, or a pattern of discrimination by Atlantic against dealers who handle non-sponsored TBA in substantial degree.[13] However, although the Commission staff scoured Atlantic's files and put into the record voluminous exhibits concerning Atlantic's TBA administration, not a single document contradicted Atlantic's free choice policy.[14]

G. Effects On Competition—The Oil Industry.

The primary effect of Atlantic's sales commission plan on competition is within the oil industry, and here the plan is beneficial to all concerned.

The advantages to the motorist are obvious. The sales commission plan provides more economical and efficient dis-

13. Such manifestations are the hallmark of coercion cases. See, for example, *United States v. Sun Oil Co.,* 176 F. Supp. 715 (E. D. Pa. 1959), in which the oil company's service station inspection report forms called for a statement "whether competitive motor oils and TBA are being displayed and sold, and the brands of those competitive products." 176 F. Supp. at 736. District officers were instructed to correct '"deficiencies" which "in almost every instance included the matter of dealers advertising, displaying and selling competitive products." 176 F. Supp. at 736. After salesmen had taken action to correct deficiencies, they reported their efforts to their supervisors. The reports "in almost every instance related to what had been done and was being done to eliminate the advertisement, display and sale of competing products at Sun stations." 176 F. Supp. at 737-8. *No such indicia of coercion are found in the instant case.*

14. Atlantic called to the stand a wide selection of dealers who were specializing in non-sponsored TBA, featuring it at their stations and advertising it by radio, television and direct mail (R. 1968-9, 2105-8). All agreed that they had continued in this pattern for years and had suffered no threats or reprisals. Two had been singled out by Atlantic as outstanding dealers (R. 1997, 2105-9). Dealers Buongiorne and Cooley, both of whom specialized in non-sponsored TBA (R. 1550-1, 1523-4), were used by Atlantic as models to whom prospective dealers were referred (R. 2024-5).

tribution of TBA at Atlantic service stations. This assures the motorist that his needs will be met promptly and at reasonable prices. A driver who burns out a headlight on a country road wants a replacement tonight, not tomorrow. He needs that replacement from the first dealer along the road. Sales commission distribution helps the Atlantic dealer to fill the motorist's need.

The advantages to the dealers are the reciprocal of those to the motorists. One Atlantic dealer's ability to replace the motorist's burned-out headlight may win a permanent customer for that dealer and all others who handle the Atlantic brand. And every Atlantic dealer's chances of having a replacement available when needed are greater under sales commission than they were under purchase-resale. For example, under sales commission there are 79 Goodyear supply points of all kinds serving Atlantic dealers in the New England states (CX 387, N. T. 2251, R. 3199). Under purchase-resale, Atlantic could never provide in the New England area more than six warehouses for tires and batteries, a single warehouse for accessories, and a few Atlantic dealers acting as supply points (R. 2293-4).

Whatever benefits the Atlantic dealers must also benefit Atlantic, and this alone would justify the sales commission plan from Atlantic's point of view. But there are other competitive advantages as well.

Atlantic encounters competition from fifteen or twenty other oil companies, many of which are larger and better known than Atlantic.[15] All these companies operate largely through dealers. Since qualified service station operators have always been in short supply, the struggle for dealers is the keenest competition in gasoline marketing (R. 2189, 2287).

---

15. Atlantic sales representatives listed the following competitors: Esso, Gulf, Amoco, Texas, Tidewater, Sinclair, Cities Service, Mobil, Sun, Shell, Pure, Calso, Crown, Saveway, Spur, Save, Crown Central, Quincy, Merit (R. 1478, 1908-9, 2188-9, 2287).

(a) the size in dollars or units of the service station TBA market or the sub-markets for tires, batteries and accessories;

(b) the relationship of the service station TBA market to other outlets for TBA;

(c) the portion of the total service station TBA market accounted for by oil company TBA programs;

(d) the portion of oil company TBA sales accounted for by Atlantic;

(e) the portion of the Atlantic dealers' TBA purchases made under the Atlantic program;

(f) the portion of all oil company TBA sales made under the sales commission plan generally;

(g) the differences between the markets for tires, batteries and accessories; or

(h) market trends or developments.

The only evidence on TBA market effect relied on by the Commission (R. 124-6) was:

(i) A showing that Atlantic dealers purchase annually about six million dollars worth of TBA through the Goodyear plan and about the same amount through the Firestone plan (R. 76). The only base to which this can be referred is a rough national figure of four billion dollars for replacement TBA (CX 247B, N. T. 314, R. 2940).

(ii) The testimony of certain wholesalers of tires, batteries and accessories that they experienced difficulty in selling to Atlantic dealers (R. 91). None offered a TBA program comparable to Atlantic's. All had other outlets for their merchandise.

(iii) Testimony that Lee Rubber & Tire Corporation and The Electric Storage Battery Company, Atlantic's tire and battery suppliers under purchase-

resale, lost Atlantic's account in 1951 (R. 77). Actually, Lee turned down Atlantic's offer to continue buying Lee on a limited basis, Lee's reason being that it wished to free its organization to solicit other potential customers in Atlantic's marketing area (CX 280, R. 472, 3005).

(iv) The fact that Atlantic has chosen to sponsor Goodyear in part of its territory and Firestone in the remainder. As stated above, the reason for this decision was Atlantic's desire to sharpen competition between the two tire companies.[19]

The effects complained of by the Commission are based on the Commission's notion of economic power and "foreclosure." They are all independent of whether the TBA reaches the dealer through purchase-resale or under the sales commission plan. The Atlantic dealer does not care how the TBA reaches him as long as it reaches him promptly; wholesalers who complain that Atlantic dealers are "foreclosed" through Atlantic's program don't know or care whether the program is purchase-resale or sales commission.[20]

---

19. See footnote 7, *supra*. The Commission inferred that Goodyear dealers are "foreclosed" from Atlantic outlets in areas where Atlantic is promoting Firestone, and vice versa. The record is to the contrary. See, for example, the testimony of Rhoades, an Atlantic dealer in a district where Atlantic sponsored Goodyear TBA. Rhoades nevertheless specialized in Firestone and was congratulated by Atlantic for his outstanding performance in selling this brand (R. 2103, 2108-9).

20. The Commission also found that Goodyear and Firestone would not execute sales commission agreements relating only to tires and tubes. This likewise has nothing to do with the distribution method by which Atlantic dealers get the merchandise. More important, the finding has no significance with respect to Atlantic. Although Atlantic has agreed to promote the entire Goodyear line, it is free under its agreement to promote any other product it wishes, either together with or in preference to Goodyear. It has in fact done so in the case of antifreeze, an important TBA product. Atlantic handles antifreeze on purchase-resale (R. 299), notwithstanding that antifreeze is included in the Goodyear and Firestone lines (R. 2363, 2611).

III. PROCEEDINGS BEFORE THE FEDERAL TRADE COMMISSION.

The Commission's complaint alleged that by reason of Atlantic's contractual relationships with its dealers, Atlantic has an inherent control, which it exercises in favor of Goodyear under the sales commission plan, and that this adversely affects competition (R. 5-12). On this basis, counsel supporting the complaint sought to prevent Atlantic from exercising its alleged control under either purchase-resale or the sales commission plan, arguing that the competitive effects would be the same.

After extensive hearings, the Commission's Hearing Examiner refused to outlaw either purchase-resale or the sales commission plan. He upheld the legality of the sales commission contract (R. 59) and dismissed the complaint as to Goodyear (R. 60).

The Examiner's conclusions, which have not been explicitly reversed or amended, included the following:

(a) There is no conspiracy between Atlantic and Goodyear to restrain the sale and distribution of TBA.

(b) Neither the sales commission contract nor Atlantic's contractual arrangements with its dealers contain any provision requiring them to purchase Goodyear TBA.

(c) The housekeeping provisions of the leases are not unreasonable or oppressive, and the renewal and cancellation provisions of the leases are in conformity with those which ordinarily appear in many leases of property.

(d) Atlantic's commission is based on substantial services rendered by Atlantic to Goodyear.

(e) No inference or implication can be drawn from Atlantic's contractual relationships with its dealers that Atlantic's control over its dealers is sufficient to force them to purchase only sponsored TBA.

(f) The Atlantic-Goodyear contract is not illegal (R. 57-9).

However, the Examiner also found that, on occasion, Atlantic intimidated dealers and forced them to purchase Goodyear TBA (R. 58).[21] Accordingly he entered an order against Atlantic prohibiting such coercion (R. 59).

Both sides appealed to the Commission, Atlantic contesting the finding of coercion and the Commission Staff renewing its request for an order outlawing Atlantic's TBA program completely. In support of its request for this broad order, the Staff argued that "the mere inhibition of the sales commission plan without more can be easily circumvented by the use of other TBA marketing plans by respondents, such as the Lee-Exide TBA purchase-resale plan used by Atlantic prior to its adoption of the sales commission plan, which would again have the same adverse competitive effects."[22]

The Commission denied Atlantic's appeal and sustained the Examiner on the issue of coercion—not under review by this Court.

On the broader issue, the Commission granted its Staff's appeal in part and denied it in part, thus taking a position different than either the Examiner or the Staff. It held the sales commission contract illegal, but refused to prohibit purchase-resale.

The Commission's order may be divided into two parts, reflecting the two issues which had developed in the case. The first four paragraphs deal with the issue of sales commission and prohibit all sales commission contracts between Atlantic and any supplier of tires, batteries or accessories. Each of these paragraphs contains an exception to permit

---

21. The Examiner listed 13 ex-dealers who said they were coerced. This compares with a total of more than 5500 dealers (R. 45-6). The Examiner discounted the testimony of 36 Atlantic dealers and 2 ex-dealers called by Atlantic who said they sold non-sponsored TBA without objection by Atlantic (R. 55).

22. Staff Br. to Commission 104.

purchase-resale. The last two paragraphs deal with the issue of coercion and prohibit Atlantic from forcing its dealers to purchase sponsored TBA or to refrain from purchasing non-sponsored TBA (R. 131). These two paragraphs are applicable to purchase-resale as well as to sales commission.

Thus, the unfairness of Atlantic's program is made to depend on the narrow distinction between selling for Atlantic's account (legal), and selling for another's account (illegal). Atlantic's right to offer TBA to its dealers is preserved, but Atlantic is forced to deliver the merchandise to the dealers in a manner which its experience has shown to be noncompetitive.

The analysis which led the Commission to outlaw the sales commission plan is as follows (R. 124):

> "Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic. Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents."

Having thus elected to base its decision on competitive effects, the Commission recognized that it must identify effects which are unique to the sales commission plan. It posed this problem as follows (R. 126):

> "Counsel for Atlantic contend, however, that no competitive consequences attend the sales commission plan which did not characterize the purchase-resale program employed by Atlantic prior to 1951. This point deserves consideration since it implies that no useful pur-

pose would be served by outlawing the sales commission plan between Goodyear and Atlantic as Atlantic would merely return to the purchase-resale method of distributing TBA, with the result that Goodyear and Firestone dealers would lose a substantial volume of sales, but without improving the lot of competing TBA suppliers as they would still be unable to sell TBA to Atlantic dealers. We believe this argument to be without merit for several reasons."

The two reasons which the Commission advanced to support its decision were: (a) the supposed competitive advantage conferred on Goodyear supply points by the sales commission plan and (b) the supposed disadvantage of small tire companies which cannot offer extensive distribution facilities (R. 125-6). These points had not been developed in the record nor argued by counsel supporting the complaint. Counsel supporting the complaint were not trying to differentiate the sales commission plan from purchase-resale. As will be shown in detail below, the two key points were improvisations of the Commission, inadequate to support the crucial distinction which the Commission rested on them.

IV. REVIEW BY THE COURT OF APPEALS.

In affirming the Commission's order, the Court of Appeals said that "the heart of this case is the economic power Atlantic possesses over its service station dealers." The Court's rationale was that this "economic power" makes the sales commission contract in effect an illegal tying arrangement (R. 3292, 3296).

In its analysis the Court of Appeals conceded that Atlantic would be free to sell and promote Goodyear TBA to Atlantic dealers under the sales commission plan, "except for the dealer's economic dependency on the oil company" (R. 3295). However, it ignored the fact that under the Commission's order, Atlantic remained free to sell and

promote Goodyear TBA to Atlantic dealers under purchase-resale despite the same assumed "economic dependency."

The Court of Appeals never addressed itself to the necessity of justifying the Commission's distinction between purchase-resale and the sales commission plan. Indeed, the ground on which the Court most relied—Atlantic's supposed "economic power"—was the one ground which the Commission had said would not support the distinction. In the Commission's words, this power "is a fact existing independently of the method of TBA distribution used by Atlantic" (R. 124).

The Court of Appeals was also mistaken in attributing the tying rationale to the Commission. The Commission did not spell out any such rationale. Moreover, the emphasis on competitive effects in the Commission's opinion in this case and in the related *Goodrich-Texaco* case discussed below is antithetical to the concept of tying. Tying is generally approached as inherently illegal without regard to competitive effects.

V. COMPANION CASES.

Contemporaneously with the filing of this case against Atlantic and Goodyear, the Commission instituted two other proceedings with respect to sales commission agreements between Firestone and Shell Oil Company, and between The B. F. Goodrich Company and The Texas Company.[23] The complaints were the same in all three cases, and all three cases were tried concurrently before the same Hearing Examiner.

23. The *Firestone-Shell* opinion is reported in *Firestone Tire & Rubber Co.*, 58 F. T. C. 371 (1961). The first opinion in *Goodrich-Texaco* is reported in *B. F. Goodrich Co.*, 58 F. T. C. 1176 (1961). The second is unreported but may be found at pages R. 200-233 of the printed record filed in No. 635. It is worthy of remark that the Commission chose as oil company respondents in those cases Shell and Texaco, the only two companies using the sales commission plan which might be considered national in the scope of their operations. Whether or not intended, the effect was to minimize the importance of the plan to regional companies.

A. Firestone-Shell Proceeding.

The Examiner's initial decision in *Firestone-Shell* paralleled his decision in the present case. Correspondingly, on appeal, the Commission entered a broad order prohibiting sales commission plans under any circumstances.

Firestone and Shell have appealed to the Court of Appeals for the Fifth Circuit, where the case has been argued and is now under advisement.

B. Goodrich-Texaco Proceeding.

The Examiner also rendered in the *Goodrich-Texaco* proceeding an initial decision substantially identical to his initial decision in this case. That is to say, the Examiner ordered Texaco to cease coercion and refused to outlaw the sales commission plan.

On appeal, the Commission made the same finding as to economic power as in the Atlantic case—namely, that Texaco has the power to cause its dealers to purchase sponsored TBA without the use of coercion. However, the Commission did not at that time outlaw the use of the sales commission plan by Texaco because it said the record contained insufficient "market data" to form a judgment as to effects on competition (58 F. T. C. at 1178-79):

> "Although there is evidence in the record tending to show that Texaco has in fact coerced its dealers to purchase sponsored TBA through use of threats of lease cancellation or other retaliatory action, we find that Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics. The determination of whether Texaco's exercise of such economic power in favor of Firestone and Goodyear [sic] under the oil company's sales commission contracts with these rubber companies constitutes an unfair method of competition depends, therefore, upon

the competitive effects of these sales commission contracts; not upon whether Texaco has exercised its power to implement such contracts through the usc of overt coercive tactics, or by more subtle, but equally effective, means.

"At issue in this litigation, then, is the legality of a particular method of distributing TBA used by respondents. A key fact in evaluating the competitive effects of respondents' use of the sales commission method of distributing TBA is the fact that Texaco has sufficient economic power with respect to its retail and wholesale petroleum distributors to cause them to purchase substantial quantities of the brand of TBA sponsored or sold by Texaco. But such economie power is a fact existing independently of any particular method of distributing TBA which Texaco may use. Whether the sales commission agreements between Firestone and Texaco and Goodrich and Texaco are unlawful must depend, therefore, upon the characteristics and the competitive effects of these sales commission agreements. For reasons set forth hereinafter, we conclude that this case must be remanded in order that market data may be introduced to show the competitive effects of Texaco's sales commission agreements with Goodrich and Firestone upon competing suppliers of tires, batteries and accessories at the manufacturing, wholesale and retail levels."[24] (Italics are the Commission's.)

On remand, the Examiner took official notice of certain matters presented by counsel supporting the complaint. He then entered a new initial decision and order which, like the Commission's order in the instant case, pro-

24. The Commission would never have written these two paragraphs and sent *Goodrich-Texaco* back to the Examiner for more evidence on competitive effects if it had adopted the tying rationale attributed to it by the Court of Appeals in the instant case.

hibited Texaco from entering into any sales commission plan with any supplier of tires, batteries or accessories.

In its review of the Examiner's second initial decision, the Commission excluded any reliance on the new matters that had been presented to the Examiner. It decided that the Examiner's conclusions and order were supported by the original record. Consequently, it affirmed the Examiner's decision and order.

The Court of Appeals for the District of Columbia reversed the Commission and ordered the complaint dismissed. *Texaco, Inc. v. F. T. C.*, 336 F. 2d 754 (D. C. Cir. 1964).

The first reason for the reversal by the Court of Appeals was its finding that the Chairman of the Commission should have disqualified himself for reasons having no applicability to the instant case. Moving beyond this to the merits of the case, the Court rejected the Commission's finding regarding Texaco's economic power over its dealers, saying (336 F. 2d at 762):

> "Consequently, we find no basis in the record for the Commission's conclusion that Texaco has controlling economic power over its dealers. The contracts with the dealers do not give rise to it, and it is the announced policy of Texaco to respect the independence of its dealers; as the evidence overwhelmingly shows, its practice has followed its policy. The mere fact that Texaco is a giant corporation and the dealers are in the main small businessmen cannot be said to demonstrate controlling economic power over the latter, particularly when, as here, the evidence is to the contrary."

Since the Commission had said that its finding of economic power was a "key fact" in evaluating any effect of the Goodrich-Texaco sales commission plan on competition, and since this key finding was now reversed, the Court of Appeals did not reach the question of alleged anticompetitive effects. It simply said that overturning the Commis-

sion's finding of controlling economic power causes the conclusion regarding anticompetitive effects to "collapse."

Finally, the Court pointed out that the respondents had endured four years of investigation and eight years of litigation. It said that these twelve years of fruitless effort by the Commission exceeded permissible limits and unreasonably harassed and oppressed the respondents. For this reason it decided to terminate the proceedings by ordering the complaint dismissed.

VI. COMPARISON OF GOODYEAR-ATLANTIC AND GOODRICH-TEXACO CASES.

Atlantic and the Solicitor General are in agreement that the result in the *Goodyear-Atlantic* and the *Goodrich-Texaco* cases should be the same.[25]

The order in each of the two cases represents a rule of general application, not the disposition of an isolated controversy.[26] The rule should be uniform throughout the industry. Moreover, Atlantic and Texaco are competitors; and Atlantic, the smaller company, should not be under a marketing handicap as against Texaco, which is three times larger.

The two Courts of Appeals reached different results because they took different views on the Commission's finding of "economic control." While Atlantic believes there are other more fatal infirmities in the Commission's order, we agree with the District of Columbia Court that the Commission erred in this regard.

---

25. The petition for writ of certiorari filed by the Solicitor General in *Goodrich-Texaco,* No. 635, says that the conflict between the two cases, if unresolved, "would create an anomalous situation in which one major oil company and a large tire company were permitted to employ essentially the same marketing practice that their competitors were prohibited from using" (p. 12).

26. At the time of the hearings, Goodyear had sales commission contracts with 12 nonrespondent oil companies, Goodrich with five, and Firestone with an undisclosed number.

In the first place, the Commission never explained its finding of controlling economic power. It appeared to feel that such power follows from the disparity in size between the oil company and the individual dealer and from the fact that the dealer does not have permanent legal tenure. The Commission's unspoken assumption is that a dealer lives in constant fear of losing his lease or his contract and that such loss will mean financial ruin.

With regard to the disparity in size, the proposition cannot be put more succinctly than it was by the Court of Appeals in its review of *Goodrich-Texaco* (336 F. 2d at 762):

> "The mere fact that Texaco is a giant corporation and the dealers are in the main small businessmen cannot be said to demonstrate controlling economic power over the latter, particularly when, as here, the evidence is to the contrary."

The contrary evidence in Atlantic's case, which is substantially the same as in the *Texaco* case, is:

First, Atlantic and Texaco and every other oil company are just as dependent economically on their dealers as the dealers are on their oil company suppliers. Atlantic relies on its dealers for 57% of its gasoline sales (R. 46). A lessee dealer is entrusted with a station representing an investment by the oil company of $50,000 or more [27] (R. 111). Every time an oil company loses a dealer, it loses business and incurs expense in locating and training a replacement. Oil companies can't afford to lose dealers. They compete

27. The Commission's notion that Atlantic's expenditure of $50,000 for an average service station is a source of power over the dealer is completely illogical. This is simply one more investment which Atlantic makes in the dealer—in addition to training costs, financing costs, and costs of promotional assistance. It is one more reason why Atlantic depends on the dealer for gasoline sales to amortize that investment. It is one more reason why Atlantic suffers if the dealer quits and leaves the investment idle.

to offer the most attractive dealer franchise. In practice, successful dealers hold their stations as long as they wish.[28]

Second, dealers are in short supply. The economics of the oil industry are such that they can readily change suppliers without financial loss. They are constantly receiving tempting offers from other oil companies.[29] They know that neither Atlantic nor Texaco nor any other oil company can afford to alienate them. They realize that their supplier must respect their rights.

Third, Atlantic, Texaco and other oil companies all have free choice policies in respect of TBA. Under this Court's decisions in *Standard Stations* and *Richfield*,[30] no oil company can require its dealers to purchase sponsored TBA or prevent them from handling the TBA of their choice. There are, in fact, no exclusive TBA dealers.

Fourth, the lessee dealer invests as little as $1,000 in his station (R. 111). His investment is generally represented by his inventory of petroleum products and TBA. When he terminates his lease, he can sell this inventory to the incoming replacement dealer at cost (R. 2027). Any successful Atlantic dealer knows that he can get a lease from one of Atlantic's competitors at the drop of a hat and with no financial sacri-

28. The lessee dealers who testified in this proceeding had been in their stations an average of more than 13 years, one as long as 24 years.

29. Twenty-one Atlantic dealers and ex-dealers testified they had received offers from Atlantic's competitors while operating Atlantic stations. Eleven Atlantic dealer and ex-dealer witnesses operated lessee stations for other oil companies before or after their association with Atlantic.

30. *United States v. Standard Oil Co. of California*, 78 F. Supp. 850 (S. D. Cal. 1948), *aff'd*, 337 U. S. 293 (1949); *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S. D. Cal. 1951), *aff'd per curiam*, 343 U. S. 922 (1952).

fice. Outside the realm of fiction, landlords are not necessarily bullies. When tenants are scarce, it is the tenant, not the landlord, who holds the whip hand.

Finally, more than 3,000 of the dealers are contract dealers who own their own stations and were described as "independent" by the Commission's own witnesses (*e.g.* R. 218).

The second basis for the Commission's finding of economic power in Atlantic's case was the Commission's belief that Atlantic was putting pressure on its dealers in various ways to purchase sponsored TBA. The Court of Appeals reflected the same belief in its statement that "behind the legalistic facade of [dealer] independence, there exists a servitude caused by the coercive pressures which Atlantic exerts upon its dealers" (R. 3292).

However the matter may have appeared to the Commission and the Court of Appeals, as presented to this Court it involves no overtones of coercion. Atlantic has not sought further review of the paragraphs of the Commission's order dealing with this issue. Compliance with those paragraphs will eliminate coercive pressures.[31]

VII. THE STALENESS OF THE RECORD.

The proceedings against Goodyear and Atlantic are just as stale as those against Goodrich and Texaco. The two started on the same day and reached this Court within a few weeks of one another.

But staleness is not the only defect of the record. There have been important developments in the marketing of TBA since the hearings in these cases. In 1956 Atlantic

31. Neither the Commission nor the Court of Appeals even considered the possibility that these paragraphs might constitute the complete answer to the case. Under this Court's decision in *Jacob Siegel Co. v. F. T. C.*, 327 U. S. 608 (1946), the Commission's order should go no further than reasonably necessary to cure the condition complained of.

and Goodyear were willing to admit that service stations constituted an increasingly important market for TBA (R. 147). Atlantic told its dealers that 35% of the motorists' replacement tire purchases were handled through service stations in 1956 and that this figure was expected to exceed 40% in later years (RXA-20, R. 2038, 3259). Contrary to this expectation, the trend has apparently reversed. Published surveys[32] indicate that the service station share of the replacement tire market fell from 35% in 1956 to about 25% in 1963.

As shown above, service station TBA is ancillary to gasoline marketing, and gasoline marketing, too, is rapidly changing. The Commission has recognized as much in an order which it issued on December 28, 1964 dismissing the matters of Pure Oil Company, The Texas Company, Standard Oil Company (Indiana) and Shell Oil Company, respectively dockets 6640, 6898, 7567 and 8537. That order, and the concurrent statement of the Commission announcing a broad inquiry into the problems of competition in the marketing of gasoline, are printed as an annex to Goodyear's brief before this Court in No. 296.

In its order of December 28, 1964, the Commission noted that certain gasoline marketing practices challenged in those cases "occurred almost a decade ago, in the mid-1950's, and competitive conditions in this dynamic and rapidly changing industry appear to have altered significantly since then." The Commission also noted that it was concurrently initiating a broad inquiry into the problems of gasoline marketing; that orders to cease and desist in individual cases could not provide a complete or effective solution to the competitive problems of the gasoline

32. National Automobile and Tire Surveys, No. 27 for 1963 and No. 28 for 1964, conducted by Alfred Politz Research, Inc. for LOOK magazine, Cowles Magazines and Broadcasting, Inc., 488 Madison Avenue, New York 22; NTDRA Dealer News, Annual Marketing Issue, January 25, 1965, National Tire Dealers and Retreaders Association, Inc., 1343 L Street, N. W., Washington 5, D. C.

industry; and that it would be more desirable to concentrate on a comprehensive industry-wide approach.

Whether or not TBA is to be covered in the Commission's industry-wide inquiry, the same considerations apply to TBA marketing as to gasoline marketing. The standards governing TBA marketing should be established on an industry-wide basis after an industry-wide examination. This examination should include the other major kinds of outlet for TBA in addition to service stations. In this way the interests of national and regional oil companies can be taken into account, and the paramount needs of the service station operators and the motorists can be respected.

The staleness of the record and the inadequacy of the Commission's case-by-case approach to TBA fully justify the Court of Appeals for the District of Columbia in dismissing the *Goodrich-Texaco* proceedings instead of remanding. And they call for similar disposition of the *Goodyear-Atlantic* proceedings.

SUMMARY OF ARGUMENT.

1. The Commission Did Not Have A Rational Basis For Denying Atlantic The Use Of The Sales Commission Plan. (Part I of Argument, Page 42 Below.)

The Commission's order denies Atlantic the use of the sales commission plan, which Atlantic has found best for itself and its dealers. The practical effect of the order is to force Atlantic to return to purchase-resale, which has proved to be a competitive handicap for Atlantic and its dealers. Under the decisions of this Court, the Commission was required to have a rational basis for making this crucial distinction.

The reasons given by the Commission will not stand up under the most casual inspection. In actuality the Commission's order helps no one and hurts Atlantic and Atlantic dealers. This is irrational.

2. The Commission Did Not Consider The Benefits And Business Necessity Of The Sales Commission Plan. (Part II of Argument, Page 46 Below.)

Although the Commission did not explicitly say so, its orders in the three cases outlawed the sales commission plan *per se* without considering the business necessity offered by Atlantic to justify its use of the plan.

Under the decisions of this Court, no business practice should be condemned *per se* unless, after full investigation, it has been shown to have no redeeming virtues under any circumstances. The Commission made no effort to comply with this requirement.

3. The Commission Erred In Condemning The Sales Commission Plan On The Grounds Of Competitive Effects Without Measuring These Effects Against Any Market. (Part III of Argument, Page 49 Below.)

The Commission rested its condemnation of the sales commission plan on supposed anticompetitive effects. It

relied entirely on characterization of these effects and did not identify any relevant market or measure the effects against any market.

In a proceeding under Section 5 of the Federal Trade Commission Act, alleged anticompetitive effects should be shown to be substantial in relation to a relevant market. The Commission erred in failing to make this showing.

4. The Court of Appeals Erred In Condemning The Sales Commission Plan As A Tying Arrangement. (Part IV of Argument, Page 56 Below.)

The first error by the Court of Appeals is its mistake in attributing the tying rationale to the Commission. Under this Court's decisions, the Court of Appeals was bound to review the Commission's action solely on the grounds invoked by the Commission.

Secondly, the Court of Appeals erred in holding that the sales commission plan is a tying arrangement. If there were any tying in the case, it would lie between Atlantic and its dealers and would be wholly independent of the sales commission plan.

In fact, there can be no tying. Atlantic's free choice policy prohibits tying, and the Commission's order against coercion reinforces the prohibition.

The attempt by the Court of Appeals to infer a tying arrangement from the fact that Atlantic is providing its dealers with stations and equipment as well as several related lines of products is unprecedented and erroneous.

Finally, this Court's decisions against tying have been made in cases where the practice represented the exploitation of a commanding market position for no other purpose than profit. There is no such exploitation in Atlantic's TBA program. Over the years it has operated on a break-even basis or at a loss. It is really an ancillary service. This Court has never outlawed such a service as constituting "tying," and the decisions of lower courts are to the contrary.

ARGUMENT.

I. THE COMMISSION HAD NO RATIONAL BASIS FOR OUTLAWING THE SALES COMMISSION PLAN.

The Commission recognizes that oil companies have a vital interest in selling TBA to their dealers. It recognizes that there are two types of arrangement which oil companies may make with TBA suppliers to get the TBA into the hands of the dealers. It forbids one of these arrangements—the sales commission plan—while permitting the other—purchase-resale.

To Atlantic, the change from purchase-resale to the sales commission plan meant a substantial saving in operating and capital costs, plus a substantial improvement in service to Atlantic dealers. The effect of the Commission's order is to reverse these benefits, to put Atlantic to unnecessary expense, and to saddle the Atlantic dealers with an unsatisfactory delivery arrangement.

More than this, Atlantic's national competitors can and do use purchase-resale successfully, so the order puts no handicap on them. This compounds the competitive disadvantage to Atlantic and the many other regional oil companies which have been using the sales commission plan.

The decisions of administrative agencies must make sense. The agency must articulate the grounds for its order, and these grounds must be sufficient to sustain the order. As this Court has said:

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States, et al. v. Chicago, Milwaukee, St. Paul & Pacific R. Co., et al.*, 294 U. S. 499, 511 (1935).

> "In either event the orderly functioning of the process of review requires that the grounds upon which the

> administrative agency acted be clearly disclosed and adequately sustained.'' *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 94 (1943).

In other words, the Commission was required to disclose and sustain a controlling reason for differentiating between the sales commission plan and purchase-resale.

This rule is all the more applicable here because the Commission in the TBA proceedings is not passing on an isolated situation. It is laying down an order of such general application as to be tantamount to legislation. It is arbitrarily invalidating the TBA marketing arrangement of a large number of small oil companies without giving them an opportunity to be heard. Under these circumstances it is vital that the purported basis for such a sweeping rule, affecting more than half the competitors in an industry, be adequately sustained. See *Eastern-Central Motor Carriers Ass'n., et al. v. United States*, 321 U. S. 194, 209-10 (1944).

In attempting to differentiate the sales commission plan from purchase-resale, the Commission relied on two alleged anticompetitive effects which it said are unique to the sales commission plan. These two effects are:

> (1) Under the sales commission plan, Goodyear's supply points make substantial sales to Atlantic dealers. This, the Commission says, gives the supply points a competitive advantage which injures competition at the wholesale level (R. 127).
>
> (2) According to the Commission, small tire companies cannot offer extensive distribution facilities as an inducement and, therefore, are at a disadvantage in competing for Atlantic's business. This, says the Commission, injures competition at the manufacturing level (R. 127-8).

The following analysis will show that these two points do not provide a rational basis for the Commission's order.

Claimed advantage to supply points. The Commission said that by reason of the business they acquire under the sales commission plan, Goodyear supply points have an advantage over their competitors. The Commission apparently forgot that many of the supply points are Goodyear company-owned stores and Atlantic supplying dealers. If Atlantic changed its arrangement with Goodyear from the sales commission plan to purchase-resale, the Goodyear company stores would presumably continue to be used as sub-warehouses for drop shipments to Atlantic dealers, and the Atlantic supplying dealers would continue to act as supply points for Atlantic. With respect to these two kinds of supply points, the Commission's order would change nothing.

However, the Commission's order would drastically affect the remainder of the supply points, the independent Goodyear dealers. By the Commission's fiat, they would be deprived of the business they now do with Atlantic dealers and their investment in that business would be rendered unproductive.

The Commission's justification for this blow at the Goodyear supply points is that this will "terminate the unjust advantage presently enjoyed by distributors of Firestone and Goodyear over local competitors representing other tire manufacturers and TBA suppliers" (R. 127).

Granting, for argument, that the independent supply points do enjoy an advantage (and this is by no means proved, as will be shown below), the Commission is wrong in believing that the advantage will be "terminated" if Atlantic is forced to return to purchase-resale. In actuality, the abolition of the sales commission plan does not mean the abolition of independent supply points, it merely means a change in their identities. The Commission forgot that if Atlantic cannot use Goodyear dealers as supply points, it will have to find Atlantic dealers to serve in their stead. And these Atlantic dealers, to the extent they can be found, will enjoy the same "advantage" (if such it be) previously

enjoyed by the Goodyear dealers. The names will be different; the "advantage" will be the same. As far as the "local competitors" mentioned by the Commission are concerned, this is a distinction without a difference.

The real difference, which the Commission ignored, is that if Atlantic must franchise the independent supply points, it is Atlantic who must bear the credit risk; it is Atlantic who must finance inventories; and it is Atlantic who must pay for delivery. Because it lacks background knowledge and personnel skilled in the TBA business, as well as the specialized distribution facilities required for TBA, Atlantic will be unable to perform these functions as well as they are performed today. The result will be less efficient distribution for Atlantic dealers.

Moreover, the Commission's underlying premise that the supply point status offers a competitive advantage is completely unfounded. Actually, the record, though scant, indicates that supply point business is neither attractive nor profitable.[33] The Commission did not produce a single dealer who desired to be a supply point and was not given that opportunity.

Claimed disadvantage of small tire manufacturers. The Commission said that small tire companies lack distribution systems to implement sales commission plans and are therefore unable to offer such plans to oil companies in competition with larger tire companies like Goodyear. Because Atlantic had once bought Lee tires under purchase-resale, the Commission assumed that smaller tire manufacturers would be able to compete for Atlantic's business if Atlantic were forced to use the purchase-resale method again. This confuses changes in brand with changes in distribution method.

Lee lost Atlantic's business before Atlantic switched to Goodyear and Firestone because the Lee brand had poor

33. The fact that a considerable number of Atlantic dealers were called on to serve as supply points shows that Goodyear dealers were not scrambling for the opportunity.

consumer acceptance outside Philadelphia. The sales commission plan had nothing to do with it.[34]

Furthermore, if Atlantic is required to return to purchase-resale, it could not afford to choose a local tire manufacturer. Tire marketing today is done very differently than it was in the 1950's when this case was tried. National advertising has made it almost impossible to sell a local product. Motorists who drive throughout the nation want a nationwide warranty. If Atlantic is forced to return to purchase-resale, it is inevitable that it will continue to sell Goodyear or Firestone, or comparable national brands with national warranties.

In sum, the Commission's order will not help the "local" TBA distributors or the small tire manufacturers for whom the Commission expressed concern. The order will hurt Atlantic and its dealers. This is a senseless result. It should not be allowed to stand.

II. THE COMMISSION AND THE COURT OF APPEALS FAILED TO WEIGH THE REDEEMING VIRTUES OF THE SALES COMMISSION PLAN.

The Commission's order, taken with its orders in *Firestone-Shell* and *Goodrich-Texas*, creates, in practical effect, a new category of *per se* violation—sales commission plans in the oil industry.

Per se violations are those which "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. v. United States,* 356 U. S. 1, 5 (1958). Under this Court's decision in *White Motor Co. v. United States,* 372 U. S. 253 (1963), no practice not previously examined by this Court should be outlawed *per se* without a full examination of the business purposes advanced in

34. Lee does, in fact, have a sales commission arrangement with another small oil company—as do Dayton, Dunlop and General, three smaller tire companies (58 F. T. C. at 408, n. 13).

justification thereof to see whether a conclusive presumption is warranted. Neither the Commission nor the Court of Appeals addressed itself to this question. They were content to recite the supposed anticompetitive effects of the Atlantic-Goodyear sales commission contract. They made no examination of the business purposes advanced in its support.

The primary reason for Atlantic's adoption of the sales commission plan was to assure that every dealer, no matter how small or remote, would have a convenient source of supply for TBA. This benefits dealers and the public. Under purchase-resale Atlantic was unable to fill this need. Under sales commission it was in a better position to do so.

The plan is ancillary to Atlantic's primary business. Its object is not to exploit TBA—Atlantic's commissions scarcely pay the cost of the program—but to stimulate the sale of gasoline. Motorists cannot be expected to patronize Atlantic stations unless the stations are in a position to meet all the motorists' needs—and promptly.

The sales commission plan also benefits Atlantic in its competition with other oil companies. Atlantic is not a giant in the industry, but a comparatively small regional company. Because it lacks the resources for a TBA distribution network of its own, Atlantic must resort to the sales commission plan to meet the competition of larger oil companies. In the oil industry, sales commission plans are typically the competitive weapon of the lesser lights.

Under this Court's decision in *White Motor,* these facts should not have been ignored.

The teaching of *White Motor* was recently followed by the Court of Appeals for the Sixth Circuit in *Sandura Co. v. Federal Trade Commission,* 1965 Trade Cases ¶ 71,332 (6th Cir. 1964). Sandura, like White Motor Company, has a territorial system of distribution under which distributors are prohibited from selling outside their assigned areas. This restriction was found by the Trade Commission to be an unfair method of competition.

On appeal, the Court of Appeals reversed the Commission. The Court of Appeals first noted that not every practice which restrains competition is an unfair method of competition, citing this Court's decisions in *Motion Picture Advertising* and *Gratz,*[35] and the Fourth Circuit's decision in *Asheville.*[36] The Court then said that, as in *White Motor,* "so must we here refuse to find Sandura's arrangements illegal without examining their particular effect on competition and the facts offered to justify the resulting restraint." 1965 Trade Cases ¶ 71,332 at page 80,396.

The Court of Appeals noted that Sandura "is a relatively small concern competing with and losing ground to the 'giants' in the floor-covering industry," and found that Sandura could not compete effectively with the giants unless it could offer its distributors closed territories. The Court concluded (¶ 71,332 at page 80,404):

> "In summary, we feel constrained to uphold the legal sufficiency of the justification made by Sandura. We are of the opinion that the Commission's rejection of its sufficiency was without supporting factual foundation. We are satisfied that the record in this case is barren of credible evidence that the public would be benefited by requiring that Sandura distributors be allowed to intrude on each other's territory. The distributors, the dealers and the public will best be served by the continued economic health and competitive existence of Sandura as well as its distributors. We are of the opinion that on this record, the only justified conclusion is that elimination of the closed territory arrangement would impair competition, rather than foster it."

---

35. *F. T. C. v. Motion Picture Advertising Service Co.,* 344 U. S. 392, 396 (1953) and *F. T. C. v. Gratz,* 253 U. S. 421, 427 (1920).

36. *Asheville Tobacco Board of Trade v. F. T. C.,* 263 F. 2d 502, 511 (4th Cir. 1959).

In the present case the Commission wholly ignored the competitive problems of small oil companies and their dealers, and this despite the fact that the record before it was replete with the problems of just such a company. Atlantic, a regional company much smaller than the industry giants, found itself unable to provide under purchase-resale the extensive distribution needed by its dealers. The business necessity which led Atlantic to adopt the sales commission plan should have been taken into account.

III. THE SALES COMMISSION PLAN IS NOT AN UNFAIR METHOD OF COMPETITION.

Section 5 of the Federal Trade Commission Act authorizes the Commission to prohibit only "unfair" methods of competition:

> "The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs." *Federal Trade Commission v. Sinclair Refining Company,* 261 U. S. 463, 475-6 (1923).

Whether particular acts are unfair competition within the meaning of the statute is for the Court, not the Commission, to decide. *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, 648 (1931).

The broad question in this case is whether the sales commission plan is an unfair method of competition in the oil industry. The answer to this question should be no.

A. The Sales Commission Contracts Are Not Unreasonable.

While the decision on the factual situation presented by *Federal Trade Commission v. Gratz*[37] would probably not be followed today, this Court's formulation in that case of the scope of Section 5 of the Federal Trade Commission Act is still controlling. That formulation, of course, is that Section 5 does not apply except to practices "opposed to good morals because characterized by deception, bad faith, fraud or oppression" and to practices "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly" (253 U. S. at 427).

There is nothing immoral in the sales commission arrangement. Nor do the contract terms unduly hinder competition. The contracts are nonexclusive and cancellable by either party on a year's notice. There is nothing to prevent suppliers of tires, batteries or accessories from competing for Atlantic's business on either a sales commission or a purchase-resale basis at the end of the notice period. Indeed, suppliers can also compete during the contract term. Atlantic handles antifreeze on a purchase-resale basis even though antifreeze is also included in the sales commission arrangements with Goodyear and Firestone. Atlantic could take on other purchase-resale items if they were offered on sufficiently attractive terms.

Moreover, there is no territorial exclusivity or rigidity. Atlantic can change the territories in which it sponsors Goodyear and Firestone at the end of any one-year period; it can take on another supplier in any part of its marketing area at any time; and it can elect to sponsor more than one supplier in a single territory as did Shell and Texaco.

Nor is there anything unusual in the basic arrangement. The idea of selling or promoting another's goods or services on commission is fundamental to American business. Every distributor of tires, batteries and accessories who

37. 253 U. S. 421 (1920).

testified in this proceeding compensated his salesmen by commission in whole or in part. Vast industries, like the insurance industry, are built on commission selling. Manufacturers' representatives perform functions for the companies they represent almost identical with those performed by Atlantic for Goodyear—and are compensated by commission.

Finally, there is nothing improper in the consideration for the commission payments. The Examiner found that the consideration is the services rendered by the Atlantic sales organization, described these services in detail (R. 48-9), and concluded that they are "substantial" (R. 58).

The matter is well summed up in the words of the Court of Appeals for the District of Columbia in the *Goodrich-Texaco* case (336 F. 2d at 763):

> "As to the implication that sales commission agreements between oil companies and TBA suppliers are basically illegal regardless of their terms, we disagree. There is no reason to condemn such contracts unless they result in unfair competition. An oil marketing company's recommendation to its dealers that they purchase a particular line of TBA, even though it rereceives a commission for doing so, is not incompatible with its primary business of selling petroleum products."

B. The Commission Did Not Measure The Competitive Effects Of The Sales Commission Contracts By Any Criteria.

The Commission does not take specific issue with the terms of the sales commission contracts. It says that the sales commission contracts are illegal because of their competitive effects. It argues, in essence, that a portion of the Atlantic dealers' TBA purchases is "foreclosed" by Atlantic's power over its dealers; that under the Goodyear-Atlantic agreement Goodyear acquires these sales for its

supply points; and that this benefits the supply points and Goodyear and hurts their competitors, the "local" TBA distributors and smaller tire manufacturers.

But the Commission never attempts to measure the extent of the benefit or burden by any recognized legal criteria. For example:

1. As to the extent of the "foreclosure," the record shows that Atlantic dealers have purchased annually about $6,000,000 of Goodyear TBA under the Atlantic program in recent years. But the record is silent on whether this represents 100% or 1% of their purchases of *all* TBA.

2. With respect to the Goodyear supply points, the record does not indicate their share of the total TBA market or the share of their business represented by sales to Atlantic dealers under Atlantic's program. Nor is there any indication how much of the Atlantic dealer purchases passes through independent Goodyear supply points as compared with Goodyear-owned facilities and Atlantic supplying dealers.

3. As for Goodyear's tire company competitors, there is no evidence of Goodyear's share of the total TBA market nationally or in Atlantic's region, although it is stated that Goodyear is the largest manufacturer of rubber products in the United States. There is no evidence that competitors of Goodyear do not have adequate outlets for their TBA. There is no evidence as to the relative use of the sales commission method and the purchase-resale method by Goodyear's competitors and Atlantic's competitors, nor of any industry trend towards one method or the other.

4. There is no evidence concerning the competition encountered by Atlantic dealers from mail order stores, discount houses, department stores and other aggressive TBA marketers.

The foregoing cannot be oversight. It is clear, although the Commission did not say as much, that the Commission did not feel required to measure the competitive effects against any market and made no attempt to do so.

It is equally clear that in an analogous proceeding under the Sherman Act or the Clayton Act, a measurement of the competitive effects against the relevant market would be required.[38] It is elementary that a contract is not an illegal restraint unless it is significant to the market. That is the test under Sections 1 and 2 of the Sherman Act. *Standard Oil Co. of New Jersey v. United States,* 221 U. S. 1 (1911); *United States v. American Tobacco Co.,* 221 U. S. 106 (1911). It is also the test under Section 7 of the Clayton Act:

> "Market shares are the primary indicia of market power . . . The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future." *United States v. Continental Can Co.,* 377 U. S. 441, 458 (1964).[39]

It is also the test under Section 3 of the Clayton Act.

> "To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract

---

38. The sales commission contract could not be a violation of Section 3 of the Clayton Act, because it does not involve a lease or sale; nor could the sales commission contract be a violation of Section 7, because there is no merger or acquisition of stock or assets. However, both the Commission and the Court of Appeals spoke generally in Clayton Act terms. They said that the Atlantic-Goodyear contract results in an "integration" of Atlantic's "market control" into Goodyear's distribution system (R. 82, 3296), thus likening the contract to an acquisition or merger.

Atlantic has always contended that the merger analogy overstates the facts and that the proper measure of legality is Section 1 of the Sherman Act.

39. As this Court said in *Brown Shoe Co. v. United States,* 370 U. S. 294, 343 (1962): "The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market."

on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S. 320, 329 (1961).

Thus, the Commission's failure to meet normal antitrust standards is apparent and virtually admitted.[40] The question is: was it required to do so when proceeding under Section 5?

C. Competitive Effects Should Have Been Measured By Normal Antitrust Standards.

Although the question presented above has not yet been squarely decided, Atlantic believes that a fair reading of this Court's opinions construing Section 5 leads to an affirmative answer. *Federal Trade Commission v. Gratz*, 253 U. S. 421 (1920); *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U. S. 392, 395 (1953); and *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 647 (1931), all indicate that where a method of competition is challenged on the ground that it is anticompetitive, normal antitrust standards prevail.

---

40. In its decision in *Brown Shoe Co.*, CCH Trade Reg. Rep., 1961-63 Transfer Binder No. 7606 ¶ 16,316, rev'd on other grounds, 1964 Trade Cases ¶ 71,312 (8th Cir. 1964), the Commission rejected the argument that it should apply, in a proceeding under Section 5 of the Federal Trade Commission Act, the test of illegality applicable to Section 3 of the Clayton Act where the challenged practices were analogous to those encompassed by the Clayton Act. It referred to its own similar ruling in *Luria Brothers and Company*, No. 6156 (1962), CCH Trade Reg. Rep. ¶ 16,183.

The Court of Appeals for the Fourth Circuit adopted this view in reviewing a Section 5 proceeding, saying:

> "Every restraint of trade is not a violation of the antitrust laws; the decisive question is whether it is an unreasonable restraint, and this depends on the significance of the restraint in relation to the particular market under investigation." *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission,* 263 F. 2d 502, 511 (4th Cir. 1959).

The Attorney General's National Committee to Study the Antitrust Laws was of the same view. In its report, issued in 1955, it said that "proceedings thus brought under Section 5 ought not, in our opinion, circumvent the essential criteria of illegality prescribed by the express provisions of the Clayton Act" (Report of the Committee, p. 149). The same view has been taken by eminent authority.[41]

We appreciate the contention of the Commission that it must have broad powers to deal with practices outside the technical confines of other antitrust statutes in the case of incipient offenses. But this is not an incipiency case. When these proceedings were instituted, the sales commission plan had been used by Atlantic for five years and by other oil companies for decades. There had been ample opportunity for the effects of sales commission plans to manifest themselves. The Commission could, for example, have examined the percentage of Atlantic dealers' TBA purchases made under the plan to see whether it was

---

41. In the area of Sherman Act offenses, "harmonization of the Commission's exercise of Section 5 jurisdiction requires the Commission to be held to the same substantive criteria as those established by judicial interpretations of the Sherman Act." Also, "Section 5 should impose upon the Commission the same burden of proof as the particular Clayton Act provision covering the 'economically equivalent' anticompetitive transaction or practice." Oppenheim, *Guides to Harmonizing Section 5 of The Federal Trade Commission Act with the Sherman and Clayton Acts,* 59 Mich. L. Rev. 821, 826, 836 (1961).

increasing or decreasing. Or the Commission could have examined the shares of all oil company dealers' TBA purchases under all sales commission plans in a given market over a given period. But it chose to ignore these objective measures and to rely entirely on characterization.

The Commission will no doubt also argue that it need not "mathematically measure" any market shares. This misses the point. We are talking of a more fundamental requirement: that when an order in an antitrust case seeks justification in competitive effects, there must be *some* area of competition (the relevant market) in relation to which the effects are to be measured. And there must be *some* measure to show the relationship between the effects and competition within the market. This is not a case of proof falling somewhat short of Sherman or Clayton Act standards. This is a case of no proof at all.

IV. THE SALES COMMISSION PLAN IS NOT A TYING ARRANGEMENT.

The Court of Appeals affirmed the Commission, not on the basis that the Commission's analysis of competitive effects was legally sufficient, but rather on the basis that the sales commission plan is inherently a tying arrangement. The Court of Appeals said that when the Commission analyzed the sales commission plan, it "found, in effect, a tying arrangement inherently anticompetitive" (R. 3297).

In point of fact, the Commission made no such finding. The Commission mentioned tying only in its discussion of coercion—not in its discussion of the sales commission plan. In talking about coercion, the Commission cited the *Northern Pacific* and *Osborn* cases[42] for the proposition that coercion, if successful, results in an implied tying agreement. Several paragraphs later the Commission took up

42. *Northern Pacific Ry. v. United States,* 356 U. S. 1 (1958); *Osborn v. Sinclair Refining Co.,* 286 F. 2d 832 (4th Cir. 1960), *cert. den.* 366 U. S. 963.

the separate question of the legality of the sales commission plan. The heart of the Commission's legal theory on this point is contained in this paragraph from its opinion (R. 124):

> "But we do not rest our decision on a mechanical application of the rule of the *Northern Pacific* and *Osborn* cases. The issue here is the legality of respondents' use of a *particular method* of distributing TBA products. Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic. Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents."

In the passage quoted above, the Commission is not saying that the sales commission plan is a tying arrangement, and it is not saying that the sales commission plan is inherently anticompetitive. Instead, it is explicitly recognizing that any economic power Atlantic may have with respect to its dealers is independent of the type of arrangement between Atlantic and its TBA supplier, and that the sales commission type of arrangement which Atlantic actually selected is illegal only if an evaluation of competitive effects proves it so.[43]

The decision of the Court of Appeals is flatly contrary to this Court's holding in *SEC v. Chenery Corporation*, 318 U. S. 80 (1943), 332 U. S. 194 (1947), that a reviewing court, in dealing with a determination or judgment which

43. This conclusion is strengthened by a reading of the corresponding passages in the Commission's opinions in *Goodrich-Texaco* quoted earlier in this brief at pp. 31-2.

an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. For this reason alone, the decision of the Court of Appeals should be reversed.

Furthermore, the notion that the sales commission plan is a tying arrangement is fallacious.

A. If The Dealer's Legal Freedom Of Choice Is Preserved, Multiple-Line Selling Is Not Tying.

In legal analysis, tying is to be distinguished from selling. Whenever a seller offers more than one line, there is the theoretical possibility that he will condition sales of one upon purchases of another. But the existence of this possibility does not lead the antitrust laws to forbid multiple-line selling. What the law forbids is affirmative action which deprives the buyer of his freedom to buy the second line or not, as he may choose.

Where a seller offers multiple lines to his customers, the law is not concerned with the likelihood that the buyer may choose to buy the second line, or with the considerations influencing his decision if he chooses to do so. The antitrust laws are violated only when the buyer surrenders his freedom of choice by entering into a tying agreement or is deprived of his freedom of choice by coercion.

The classic statement of the distinction between salesmanship and coercion is the trial judge's instructions to the jury in the *General Motors* case, which was before this Court in *Ford Motor Co. v. United States,* 335 U. S. 303 (1948). The Commission itself quoted (R. 99) this Court's commentary on those instructions (335 U. S. at 316-17):

> "Their plain effect is to draw a line between such practices as cancellation of a dealer's contract, or refusal to renew it, or discrimination in the shipment of automobiles, as a means of influencing dealers to use GMAC, all of which fall within the common understanding of 'coercion,' and other practices for which 'persuasion,' 'exposition' or 'argument' are fair characterizations."

The rule has been codified in the Automobile Dealers' Day in Court Act, 15 U. S. C. § 1221-25 (1958), which requires manufacturers to treat their dealers in a fair and equitable manner "so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party." The Act then provides that "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith". 15 U. S. C. § 1221(e).

Every court which has considered the matter has upheld the right of an oil company to sell TBA to its dealers so long as the dealers' freedom of choice is preserved. In *United States v. Sun Oil Co.,* 176 F. Supp. 715 (E. D. Pa. 1959), a proceeding under Section 3 of the Clayton Act, the court struck down exclusive dealing contracts under which Sun dealers were required to buy TBA from Sun, including Kelly-Springfield tires and Sun batteries and accessories. The Court's decree (unreported) said "it is not the intendment and purpose of this decree to in any wise prohibit any Sun dealer, of his own free choice, from dealing exclusively in Sun's products and in the line of 'tires, batteries and accessories' sponsored by Sun."

A similar provision appears in the consent decree in *United States v. Standard Oil Co. of California,* 1959 Trade Cases ¶ 69,399 (S. D. Cal. 1959). The decrees affirmed by this Court in the *Standard Stations* and *Richfield* cases[44] did not prevent the oil companies from selling TBA to their dealers, absent exclusive dealing contracts. There is a clear implication to the same effect in the Commission's orders in *United States Rubber Co.,* 28 F. T. C. 1489 (1939) and *Atlas Supply Co.,* 48 F. T. C. 53 (1951).

More recently, the Court of Appeals for the Fourth Circuit recognized the right of an oil company to sell TBA

44. *United States v. Standard Oil Co.,* 78 F. Supp. 850 (S. D. Cal. 1948), *aff'd* 337 U. S. 293 (1949); and *United States v. Richfield Oil Corp.,* 99 F. Supp. 280 (S. D. Cal. 1951), *aff'd per curiam* 343 U. S. 922 (1952).

to its dealers in *Osborn v. Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960). The Court held that the particular dealer who was the plaintiff in the case had been forced to buy sponsored TBA as a condition of lease renewal—which was unlawful. However, the Court went on to say (286 F. 2d at 836):

> "Of course, a seller may attempt to persuade a buyer to purchase his products rather than those of his competitors, and such salesmanship efforts do not run afoul of the antitrust laws, unless the sale of one product (the tying product) is made under an agreement, arrangement or condition under which the buyer must also purchase another (the tied) product."

The rule of all these authorities is clear: *preservation of the dealers' freedom of choice is the touchstone of legality in dealings between manufacturers and their dealers.*

Atlantic's contracts with Goodyear and Firestone recognized the essentiality of the distinction between selling and tying. Atlantic's confirming letter to Goodyear says (CX 16, N. T. 35, R. 2369):

> "Of course, we both understand that our [i.e., the Atlantic] organization cannot and will not use any methods other than salesmanship to encourage our resale outlets to purchase your products and services."

Atlantic's letter to Firestone says (CX 106A-B, N. T. 35, R. 2617):

> "It is understood that all such Atlantic retail outlets or distributors are free to choose whether, and to what extent, they shall purchase Firestone products and services, and that Atlantic representatives cannot and will not use any methods other than salesmanship to encourage such retail dealer outlets or distributors to purchase Firestone products and services."

Through its published and reiterated policy, Atlantic made known to its dealers its determination to respect their freedom of choice.

Moreover, as the case is presented to this Court, the dealers' freedom of choice is protected not only by Atlantic's policy, but by the explicit provisions of the Commission's order regarding coercion. Under these proscriptions there can be no tying, and the Commission so recognized by permitting Atlantic to return to purchase-resale.

B. Atlantic's Other Relationships With Its Dealers Do Not Deprive Them Of Their Freedom Of Choice.

The Court of Appeals took a novel approach which has sweeping implications for all marketers of branded merchandise. Like the Commission, the Court of Appeals said that Atlantic's "economic power" is sufficient, without coercion, to cause dealers to buy substantial amounts of sponsored TBA. But whereas the Commission said that Atlantic's exercise of this "economic power" by selling TBA to the dealers is illegal only if it has anticompetitive effects, the Court of Appeals said that such selling is automatically illegal tying (R. 3295-6).

Simply translated, the theory of the Court of Appeals is that whenever a salesman has other business relationships with a customer which may cause the customer to prefer to deal with that salesman, a sale by that salesman to that customer automatically becomes a tie-in.

In the instant case, Atlantic has relationships with its dealers extending over many years. Out of these relationships flows a feeling on the dealers' part which can be characterized as loyalty, confidence or goodwill. Atlantic's sponsorship means something to these dealers. They know from experience that Atlantic will stand behind the merchandise it endorses. They tend to buy the TBA that Atlantic recommends. This is all that supports the tying theory of the Court of Appeals.

The effects of this theory reach further than the sales commission plan. Every manufacturer enjoys the goodwill of his dealer customers. Every salesman enjoys the goodwill of those to whom he sells. Many salesmen are engaged because they have a good list of established customers. Surely the Court of Appeals does not consider this unfair.

The fact that Atlantic's goodwill stems from other relationships with its dealers as lessor and gasoline supplier is likewise immaterial. Most successful business relationships lead to other relationships between the parties. Satisfied borrowers deposit money with the bank that has advanced them credit. Does the Court of Appeals wish to prevent the bank's trust department from offering them services relating to their estates?

Private business is not done on sealed bids. Often a sale is based on prior dealings. Often the basis is reputation of its maker. Often, as in the case of Atlantic-sponsored TBA, it is the superior sales promotion or other services accompanying the product. This is part of the goodwill which is the stock in trade of every successful salesman.

As pointed out above, the key question is not whether Atlantic enjoys the goodwill of its dealers or whether the dealers tend to buy the TBA that Atlantic sponsors. The key question is whether Atlantic has preserved the dealers' legal freedom to buy other TBA of their own choice. This Atlantic has scrupulously done.

C. Atlantic's TBA Program Does Not Exploit The Dealers.

The Court of Appeals completely failed to appreciate the commercial realities of the situation. Atlantic is a gasoline marketer; it is not in the TBA business. Its only interest in TBA is as a means of strengthening its dealers and increasing gasoline sales. It makes no profit on TBA.

Thus, Atlantic's sales commission program lacks the feature of exploitation which characterizes most tying prac-

tices and underlies this Court's decisions outlawing them. Admittedly, it is not legitimate for a manufacturer to exact a profit from the sale of an unwanted product as a condition of selling the desired product. But it is quite legitimate for Atlantic to offer an ancillary product at no profit as part of its franchise in order to increase its sales of its principal product. It is all the more legitimate when the arrangement benefits every Atlantic dealer, since all of them have a mutual interest in promoting sales of Atlantic gasoline.

The statements by the Court of Appeals that "the system [meaning the sales commission plan] was designed to exploit Atlantic's created and controlled service station market" (R. 3296), and that "It [the sales commission plan] is anticompetitive largely because competition for the business of the individual service station is replaced by competition for the oil company's domination of its dealers" (R. 3297) are both contrary to the record. The history of Atlantic's TBA program shows that it was designed to help the dealers, not to exploit them. Because the dealers, from the beginning, looked to Atlantic for TBA assistance and preferred to buy TBA through Atlantic's program, there has always been competition for Atlantic's account, as distinguished from the separate accounts of the dealers. Under purchase-resale all Atlantic-sponsored TBA was purchased by Atlantic and TBA manufacturers competed for Atlantic's account. Under the sales commission plan they compete for Atlantic's sponsorship.

The difference between the exploitation of market leverage and the incorporation of an ancillary service into a franchise program was recently recognized by the Court of Appeals for the Sixth Circuit in *Crawford Transport Company, Inc. v. Chrysler Corp., et al.*, 1964 Trade Cases ¶ 71,260 (6th Cir. 1964). In that case, Chrysler, in order to streamline its delivery network, undertook to select the carriers to make deliveries to dealers, even though the dealers paid the costs of delivery. This arrangement was

attacked as an illegal tie-in by a carrier not on Chrysler's selected list. The contention was rejected by the Court of Appeals on the ground that Chrysler had no financial interest in the selected carriers, did not seek to invade or dominate the trucking field, and was only trying to save money for itself and its dealers.[45] The Court concluded (1964 Trade Cases ¶ 71,260 at 80,123):

> "The purpose of the Sherman Act is to preserve for industry free access to competitive markets and to prevent monopolies in restraint of trade. It is well to take a look at the commodity and at the nature of the business with which we are dealing here. Chrysler is a manufacturer of automobiles. Its two great competitors are Ford and General Motors. The public interest lies in the protection of that competition. Chrysler found it necessary to centrally control the delivery of automobiles to dealers in order to compete more effectively with Ford and General Motors in all areas of the country. To allow Chrysler's financial position in the field of automobile manufacture to be sapped and drained through unnecessary transportation costs would be unreasonable. To subordinate Chrysler's interest to that of the transportation companies, would, so to speak, permit the tail to wag the dog. What benefits Chrysler ultimately inures to the benefit of Chrysler dealers and to the public."

So, here, what benefits Atlantic and its dealers in the struggle with the titans of the oil industry ultimately benefits the motoring public.

---

45. See also *Brown Shoe Co. v. F. T. C.*, 1964 Trade Cases ¶ 71,312 (8th Cir. 1964), in which the Court of Appeals held that Section 5 of the Federal Trade Commission Act was not intended to prevent a manufacturer from offering sales promotion services to its franchisees, even on a basis that could be analogized to tying.

CONCLUSION.

The Commission has promulgated a broad rule outlawing a time-honored way of doing business. It has done this without analyzing the market and without weighing the effects its order will have on competition. Its order discriminates against small oil companies, militates against independent supply points, and helps no one. In short, the Commission's order is irrational.

The Court of Appeals has ignored the issues in the case.

The record in this case was made eight years ago. By the Commission's own admission, market conditions have changed drastically in the meanwhile.

In a wholly separate proceeding the Commission is undertaking an industry-wide examination which can appropriately include the subject matter of these proceedings.

Wherefore, Atlantic submits that these proceedings should be dismissed.

Respectfully submitted,

Frederic L. Ballard, Jr.,
Charles I. Thompson, Jr.,
Tyson W. Coughlin,
Land Title Building,
Philadelphia, Pa. 19110,

Roy W. Johns,
Joel L. Carr,
Harry W. Gill, Jr.,
260 South Broad Street,
Philadelphia, Pa. 19101,
Attorneys for Petitioner, The Atlantic Refining Company.

Ballard, Spahr, Andrews & Ingersoll,
Land Title Building,
Philadelphia, Pa. 19110,
Of Counsel.

February 5, 1965.